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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-1911

MICHAEL EDWARD CHASE,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

On Petition for Writ of Certiorari to
The Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

Petitioner seeks to review the opinion of the Court of Criminal Appeals of Texas reported at 508 S.W. 2d 605.

JURISDICTION

The formal jurisdictional requisites would seem to be satisfied; however, Respondent dispute Petitioner's contention that rights guaranteed by the United States Constitution were denied to Petitioner.

QUESTIONS PRESENTED

Whether it is constitutionally permissible for officers to verify the details of an oral confession when on a particular premises under a valid search, warrant issued to search for other evidence where the verification by observation and photographing was eminently reasonable under the circumstances.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner asserts that the Fourth, Fifth and Fourteenth Amendments to the United States Constitution are involved.

STATEMENT OF THE CASE

Petitioner was convicted in the state courts of Texas, a life sentence being imposed.

On August 21, 1971, the deceased spent the night at Petitioner's house; the parents of Petitioner were away from home at this time.

On August 24, 1971, the body of the deceased was found on a river bank encased in a sleeping bag around which a rope was bound. The body was covered by a sheet of plywood. Death had been caused by stab wounds.

Petitioner was later arrested for the murder and after being taken before a magistrate, he gave an oral statement to the interviewing officers. Petitioner related that on August 21 he and the deceased had gone to a party and then returned to Petitioner's home to spend the night. An argument

ensued but Petitioner would not further duscuss the incidents surrounding the death. Petitioner did state that he found the deceased on the floor the next morning and then placed the body in a sleeping bag and bound it with the rope. After secreting the body in a shed for a time, Petitioner placed the body in a pickup, covered it with a sheet of plywood which was used as a table in his brother's room. The body was taken to the river bank and deposited in the water at the edge of the bank. The plywood was placed over the body.

The foregoing facts were learned from Petitioner's statement. Under the law of Texas (which is unique in this respect), an oral confession is not admissible unless it is corroborated by some evidence discovered as a result of the statement. See Article 3822, Texas Code of Criminal Procedure.

To obtain corroboration, the investigation officers obtained a search warrant to look for the length of rope from which had been cut the piece used to bind the body. Probable cause to search Petitioner's home is obvious since Petitioner had related the fact of cutting the victim-tying rope from a longer piece.

When the officers executed the search warrant they also took the plywood table top with them to see if it fit into place in the room of Petitioner's brother -- possible further corroboration of Petitioner's story.

The remaining rope was not found. However, the plywood did fit the hinged and chained arrangement in the brother's room, and pictures were

of the plywood in place as a sort of hinged, hanging table. The pictures were used in evidence at Petitioner's trial.

Complaint is made here that checking out the plywood table top (which had been found covering the victim's body) and the evidential use of this corroborating factor was impermissible under the Fourth Amendment.

ARGUMENT AND AUTHORITIES

While the checking for the fit of the plywood table arrangement seems completely reasonable under the circumstances disclosed by this case, it is difficult to find a Fourth Amendment classification or pigeonhole in which to place this investigatory procedure.

Notice is first made that a search for mere evidence, as countenanced by this Court in Warden v. Hayden, 387 U.S. 294 (1967), is not authorized under the laws of Texas. (See Articles 18.02 and 18.09 of the Texas Code of Criminal Prodecure before their amendment in 1973 by the Texas Legislature.) Possibly, but not certainly, a federal search warrant would be authorized under Hayden to search for and seize (by photograph) the screw holes and the chain fittings used to secure the plywood table in place. However, under Texas law, as noted, no search warrant could be issued to obtain the type of evidence secured here. Nevertheless, this negative factor does not vitiate the evidence obtained by the table top-room fittings comparison.

The Securing of The Table Top Corro-

boration Evidence Was Proper Under The Circumstance Existing In This Case.

1. There Was No Search -- The Table Top-Fittings Comparison Is Sustainable Because It Was Within Plain View

The officers in this case were lawfully on Petitioner's premises by virtue of a valid search warrant to search for a portion of rope that could possibly be identified as the remaining portion of the rope used to bind the victim within the sleeping bag. While lawfully on the premises, the officers were entitled to observe all within plain view including the brother's room with its tabletop fittings and to obtain the evidence within "plain view" by means of photographs even though the evidence so obtained was not described in the search warrant. Harris v. United States, 390 U.S. 234 (1968); Warden v. Hayden, supra. (The requirement that any plain view evidence must be happened upon inadvertently, as stated in Coolige v. New Hampshire, 403 U.S. 469 (1971), only involves a situation where the officers are on premises without a search warrant).

2. If The Table-Top Fittings Comparison Be Deemed A Search, Then Such Search Was Reasonable Under The Circumstances

Should the comparison of the table top with its wall and ceiling fittings be construed to be a search and the photographing of the table in place be held to be a seizure, this search and seizure is not unreasonable by Fourth Amendment standards.

The Fourth Amendment reads (when broken down intoits two clauses):

(1) "The right of the people to,be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and
(2) "No warrants, shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

First, notice is again made that the officers were on the premises by virtue of a valid search warrant -- to look for rope. The intrusion upon privacy was an accomplished fact with the service of the warrant. Little more invasion of privacy was occasioned by the table top experiment.

Second, the premises involved were the scene of a crime of violence as revealed by Petitioner's own words. Can it be said to be unreasonable for the police to investigate the scene of the crime?

Third, all the circumstances point to the reasonable conduct of the officers in obtaining the table top comparison. If the table fitted properly, material evidence was obtained to be used against Petitioner. However, if the table failed to fit, all of Petitioner's statement would have been suspect and additional investigation of other persons would have been made, a possible benefit to Petitioner.

The search and seizure here (if such it be) is easily sustainable under the first clause of the Fourth Amendment which prohibits only unreasonable searches. If the test be only one of "reasonableness", then the search here passes with flying colors.

This Court has stated in Carroll v. United States, 276 U.S. 132, 147:

> "The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable."

In Cady v. Dombrowski, _____ U.S. _____, 93 S. Ct. 2523, 2527 (1973), it was stated:

> "The ultimate standard set forth in the Fourth Amendment is reasonableness." (Emphasis added.)

Applying the foregoing standards to the present case, the table top-fittings search was constitutionally sound.

CONCLUSION

For the reasons advanced above, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that a copy of the above and foregoing Respondent's Brief in Opposition has been served by placing the same in the United States Mail, postage prepaid, certified, on this _____ day of _____, 1974, addressed as follows: Emmett Colvin, Attorney at Law, 1100 Adolphus Tower, Dallas, Texas 75202.

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